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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

TODD C. DANLY et al.,

Plaintiffs and Respondents,

v.

W. MICHAEL SCOTT,

Defendant and Appellant.

G039447

(Super. Ct. No. 06CC02850)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jane D. Myers, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

David B. Dimitruk for Defendant and Appellant.

Law Offices of Michael S. Magnuson and Michael S. Magnuson for  
Plaintiffs and Respondents.

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A dispute concerning the Scott, Danly, Hernandez Partnership (the Partnership) resulted in several lawsuits. While the first lawsuit was pending (Lawsuit No. 1), certain of the partners, including appellant W. Michael Scott (Scott), caused the Partnership to transfer a piece of Partnership real property to Scott individually. A second lawsuit pertaining to Partnership assets ensued (the Lawsuit No. 2). A judgment for the dissolution of the Partnership and for an accounting was entered in Lawsuit No. 1 and Lawsuit No. 2 was dismissed thereafter.

About two months after the judgment was entered in Lawsuit No. 1, Scott transferred the real property to a corporation known as The Car Wash at Sunny Hills, Inc. (The Car Wash), of which he was chief executive officer and 95 percent owner. The Car Wash later contracted to sell the real property to a third party.

An amended judgment was entered in Lawsuit No. 1 ordering Scott to cause The Car Wash to convey an undivided 45 percent interest in the real property to partners Todd C. Danly and Kathleen L. Danly (the Danlys) as part of their fractional share of the Partnership assets. Six months after the amended judgment was entered, bankruptcy proceedings were commenced with respect to The Car Wash.

Having been unable to collect their share of Partnership assets, the Danlys filed the third lawsuit (Lawsuit No. 3), which is the subject of this appeal. In Lawsuit No. 3, the Danlys sought and obtained a judgment against Scott in the amount of \$1,052,292.30, relative to their share of Partnership assets. Scott makes several arguments on appeal, most of them having to do with the bankruptcy proceedings pertaining to The Car Wash. He complains that the judgment in Lawsuit No. 3 “represents an unlawful sanction for the exercise of federal rights” in the form of the bankruptcy proceedings. In addition, he argues that the trial court: (1) lacked subject matter jurisdiction, given the bankruptcy proceedings; (2) erred in failing to apply the doctrines of res judicata and collateral estoppel with respect to certain bankruptcy court determinations; (3) erred in disallowing certain evidence connected with the bankruptcy

proceedings; (4) erred in its valuation of the real property; and (5) erred in failing to address each issue identified in his request for a statement of decision.

We reject Scott's arguments. The judgment in Lawsuit No. 3 is a judgment against Scott individually, not a judgment against The Car Wash. It pertains to his obligations arising out of the Partnership and not to the assets of The Car Wash. The legal maneuvering is at an end. We affirm the judgment.

## I

### FACTS

Scott was the sole shareholder of Sunny Hills Car Care Ltd., a California corporation (Sunny Hills). In 1991, he sold an undivided 45 percent interest in Sunny Hills to Todd C. Danly (Danly).

On September 1, 1995, the Partnership was formed. Scott held a 50 percent interest therein, the Danlys held a 45 percent interest, and Oscar C. and Ramona G. Hernandez (the Hernandezes) held a 5 percent interest. The purpose of the Partnership was real estate ownership. Also on September 1, 1995, the Partnership leased to Sunny Hills certain real property located on Bastanchury Road in Fullerton, California (the real property), for the operation of a car wash and service station.

In April 2001, Scott filed Lawsuit No. 1 (*W. Michael Scott v. Todd C. Danly et al.* (Super. Ct. Orange County, 2004, No. 01CC04341)), alleging, inter alia, that Danly had failed to complete payment for the purchase of his interest in Sunny Hills. The Danlys filed a cross-complaint against Scott, Sunny Hills, and the Partnership, asserting numerous causes of action, including fraud, breach of fiduciary duty, breach of partnership agreement, accounting, and dissolution of partnership agreement. Sunny Hills filed a cross-complaint against Danly for breach of contract, unjust enrichment, conversion and removal of director.

Trial was scheduled for April 8, 2002. On that date, the parties stipulated to binding arbitration, and the trial date was thereafter vacated. On April 11, 2002, Scott

and the Hernandezes executed a grant deed on behalf of the Partnership, whereby the Partnership transferred the real property to Scott individually. Scott did not make any payment to the Partnership in exchange for receipt of title to the real property.

The Danlys then filed Lawsuit No. 2 (*Todd C. Danly et al. v. W. Michael Scott et al.* (Super. Ct. Orange County, 2002, No. 02CC05630)), in which they sought, inter alia, to set aside the transfer of the real property to Scott. Their notice of lis pendens was expunged by court order on April 26, 2002.

On September 17, 2002, the arbitrator's award in Lawsuit No. 1 was confirmed. One month later, judgment was entered. The judgment awarded nothing to Scott on his complaint against the Danlys, no monetary recovery to the Danlys on their cross-complaint against Scott, Sunny Hills and the Partnership, and nothing to Sunny Hills in its cross-complaint against Danly. However, it ordered the dissolution of the Partnership and an accounting. On December 16, 2002, Scott transferred the real property to The Car Wash. He received nothing of value in exchange for the transfer of title.

Upon the Danlys's request, Lawsuit No. 2 was dismissed on February 28, 2003. On December 8, 2003, The Car Wash entered into an agreement for the bulk sale of all of its assets, including the real property, to Vatani Enterprises, Inc. (Vatani) for \$7,450,000. Scott, as president of The Car Wash, executed the bulk sale agreement.

Before the escrow closed, the Danlys learned of the pending sale. They did not object to the sale, to the extent that the proceeds would be appropriately apportioned between the Partnership, relative to the real property, and The Car Wash, relative to other assets. The issue was raised at a hearing in Lawsuit No. 1 on February 10, 2004.

On February 10, 2004, an amended judgment was entered in Lawsuit No. 1, ordering Scott to cause The Car Wash to convey an undivided 45 percent interest in the real property to the Danlys, and an undivided 5 percent interest in the real property to the Hernandezes. It also ordered assignments of certain other Partnership assets to be made

50 percent to Scott, 45 percent to the Danlys, and 5 percent to the Hernandezes. In addition, it ordered any Partnership liabilities to be divided in the same percentages. The escrow for the bulk sale closed on February 18, 2004.

The Car Wash filed chapter 11 bankruptcy proceedings on August 6, 2004. On December 20, 2004, the Danlys filed a \$715,733 creditor's claim in the bankruptcy proceedings, based on the amended judgment in Lawsuit No. 1. The bankruptcy court disallowed the Danlys's claim by order entered July 6, 2005.

The Danlys then commenced Lawsuit No. 3 (*Todd C. Danly et al. v. W. Michael Scott* (Super. Ct. Orange County, 2007, No. 06CC02850)). They asserted causes of action for breach of partnership agreement, breach of fiduciary duty, accounting and alter ego liability. The Danlys alleged, inter alia, that following the entry of the amended judgment in Lawsuit No. 1, Scott had failed to credit them with their share of the proceeds arising out of the sale of the real property and that he had failed to account with respect to their share of Partnership assets generally. The court entered judgment in favor of the Danlys and against Scott in the amount of \$1,052,292.30, plus interest at 10 percent per annum. Scott appeals.

## II

### DISCUSSION

#### A. *BANKRUPTCY RELATED ISSUES:*

##### *(1) Sanction for Filing Bankruptcy Proceedings –*

Scott takes issue with the trial court's finding that he failed "to account for and credit the Danlys for their share of the profits and obligations arising from the sale of the partnership real property, and attempt[ed] to prevent the Danlys from obtaining their share of the proceeds of the sale of a partnership asset." He says that the only way in which he conceivably could have prevented the Danlys from obtaining their share of the proceeds of the sale of the Partnership real property was to have caused the filing of the bankruptcy proceedings pertaining to The Car Wash, or to have otherwise participated in

the bankruptcy proceedings, inasmuch as the proceeds of the real property sale were an asset of The Car Wash.

We disagree with Scott's reasoning. The real property was transferred three times before the bankruptcy proceedings were filed: (1) from the Partnership to Scott; (2) from Scott to The Car Wash; and (3) from The Car Wash to Vatani. The third transfer took place after the trial court, in the amended judgment in Lawsuit No. 1, had ordered Scott to cause the conveyance of a 45 percent interest in the real property to the Danlys. The bankruptcy of The Car Wash, following the third transfer of the real property, is not the only way in which the Partnership, and hence its owners, was deprived of the asset, or its proceeds.

This issue aside, Scott insists that entering judgment against him in the state court proceeding was tantamount to penalizing him for exercising his lawful right under federal law to commence bankruptcy proceedings. He cites this court's opinion in *Saks v. Parilla, Hubbard & Militzok* (1998) 67 Cal.App.4th 565, in support of his position. In that case, we held that a state court was without subject matter jurisdiction to hear a malicious prosecution and abuse of process lawsuit brought by a party who had prevailed in an adversary proceeding filed against him in chapter 11 bankruptcy proceedings. (*Id.* at pp. 567, 574.) In that case, we observed: “Filings of bankruptcy petitions are a matter of exclusive federal jurisdiction. *State courts are not authorized to determine whether a person's claim for relief under a federal law, in a federal court, and within that court's exclusive jurisdiction, is an appropriate one.*” (*Id.* at p. 568.)

However, the trial court in Lawsuit No. 3 neither determined whether The Car Wash's claim for protection from creditors was appropriate, nor determined whether the Danlys's creditor's claim filed in the bankruptcy proceedings was appropriate. Rather, it determined that Scott, individually, had not accounted for Partnership property. This is a different matter, not bound up in the bankruptcy proceedings. Scott did not exercise the federal right to file a bankruptcy petition with respect to his personal estate.

Only The Car Wash exercised the federal right to commence bankruptcy proceedings, and the trial court did not impose a sanction against it for having done so.

*(2) Exclusion of Bankruptcy Court Pleadings –*

*(a) Introduction*

Scott claims that the court committed prejudicial error in excluding certain items from evidence. The court admitted into evidence the Danlys's proof of claim filed in the bankruptcy proceedings, and the bankruptcy court's order disallowing their claim. However, when Scott sought to introduce, as exhibits 42, 43 and 44, three pleadings filed in the bankruptcy proceedings, the Danlys objected on the basis of relevance and hearsay and the court declined to admit the exhibits.

Scott maintains that the exhibits were relevant, because they showed that the Danlys's core claims in the bankruptcy and in Lawsuit No. 3 were the same. In other words, the proffered evidence would have demonstrated that the Danlys's claims in Lawsuit No. 3 should have been barred due to federal preemption, lack of state court jurisdiction, and res judicata. He claims that the erroneous exclusion of the evidence was prejudicial and requires reversal.

*(b) Standard of review*

Scott acknowledges that California courts, in reviewing purported errors in evidentiary rulings, apply the reasonable probability standard of review enunciated in *People v. Watson* (1956) 46 Cal.2d 818, 836. However, he engages in lengthy discourse as to why this court should reject this standard of review in favor of the one enunciated in *Obrey v. Johnson* (9th Cir. 2005) 400 F.3d 691, 700 which provides that “‘the burden [is] on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.’ [Citation.]” We decline Scott's invitation to apply federal law to state court proceedings or to undertake a lengthy analysis and comparison of state and federal laws on the standard of review.

Suffice it to say, “the California Constitution, unlike its federal counterpart, contains a provision specifically addressed to the issue of reversible error. It provides that ‘[n]o judgment shall be set aside’ for various kinds of error in the conduct of the trial, including . . . ‘improper admission or rejection of evidence,’ unless ‘an examination of the *entire cause, including the evidence*’ indicates that the error resulted in a ‘miscarriage of justice.’ (Cal. Const., art. VI, § 13, italics added.)” (*People v. Breverman* (1998) 19 Cal.4th 142, 173, fn. omitted.) The “‘prejudicial effect of [an evidentiary] error is to be determined, for purposes of California law, under the generally applicable reasonable-probability test embodied in article VI, section 13 . . . . [Citing *Watson, supra*, 46 Cal.2d 818, 836.]’ [Citation.]” (*People v. Breverman, supra*, 19 Cal.4th at p. 174, fn. omitted.)

Under *People v. Watson, supra*, 46 Cal.2d 818, appellate “review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration.” (*People v. Breverman, supra*, 19 Cal.4th at p. 177.) “[E]ven where evidence is improperly excluded, the error is not reversible unless “‘it is reasonably probable a result more favorable to the appellant would have been reached absent the error. [Citations.]” [Citation.]’ [Citations.]” (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431-1432.)

(c) Analysis

As we shall show, we need not determine whether the trial court erred in excluding exhibits 42 through 44. Even if it erred, it is not reasonably probable that a result more favorable to Scott would have been reached in the absence of such error. (*Tudor Ranches, Inc. v. State Comp. Ins. Fund, supra*, 65 Cal.App.4th at pp. 1431-1432.)

In their proof of claim, the Danlys claimed \$715,733 as an unsecured nonpriority claim, based on the amended judgment in Lawsuit No. 1. A copy of the amended judgment was attached to the proof of claim. In exhibit 42, The Car Wash’s objections to the Danlys’s claim, The Car Wash stated that the amended judgment itself plainly revealed that it was not against The Car Wash. The Car Wash described the

amended judgment as “an accounting-type judgment that was made in connection with the dissolution of a partnership.”

In exhibit 43, the Danlys’s opposition to the objections of The Car Wash, the Danlys raised several points. First, they noted that they, as partners of the Partnership, were judgment creditors of Sunny Hills. They characterized the amended judgment in Lawsuit No. 1 as a “determination of amounts due the [P]artnership from [Sunny Hills], and a division of those amounts among the partners.” They acknowledged that The Car Wash was not a party to Lawsuit No. 1. However, they asserted that The Car Wash was liable for the debts of Sunny Hills as the successor corporation thereto, the former having taken over all of the assets and assumed all of the debts of the latter. In addition, the Danlys asserted that The Car Wash was the alter ego of Sunny Hills. Finally, they remarked that to exclude them as creditors entitled to share in the bankruptcy estate would be to reward Scott for self-dealing, breach of fiduciary duty, and fraud.

Exhibit 44 was The Car Wash’s reply to the Danlys’s opposition. In the reply, The Car Wash observed that, despite the Danlys’s arguments, the amended judgment still did not constitute an award against The Car Wash. It asserted several additional points, including the position that it was too late for the Danlys to press their various arguments. The bankruptcy court, having read the papers and heard oral argument, disallowed the Danlys’s claim.

As the foregoing shows, the exhibits, rather than proving The Car Wash’s points, prove the Danlys’s points. Had the trier of fact considered the three exhibits, it is not reasonably probable that it would have ruled in favor of Scott.

The proof of claim made clear that the Danlys sought \$715,733 based on the amended judgment in Lawsuit No. 1. The Danlys’s opposition to the objections explained the breakdown of that amount. The amended judgment determined that unpaid rent in the amount of \$592,481 was owed to the Partnership and that \$266,616.45 of that

amount was owed to the Danlys as their 45 percent share. It also determined that loans due the Partnership from Sunny Hills totaled \$998,037 and that \$449,116.65 of that amount was owed to the Danlys as their 45 percent share. As the Danlys explained in their opposition, they sought the \$266,616.45 in unpaid rent and the \$449,116.65 in unpaid loans, totaling \$715,733, from The Car Wash, as successor to Sunny Hills.

The bottom line is this: The \$715,733 the Danlys sought in the bankruptcy proceeding had to do with their share of the unpaid rent and loans, not their share of the real property. Their share of the real property was addressed in the judgment in Lawsuit No. 3. Inasmuch as that judgment did not address the same property rights as were pursued in the Danlys's claim in bankruptcy, any error in failing to admit the exhibits so proving was harmless.

*(3) Subject Matter Jurisdiction –*

Scott also argues that the bankruptcy court had exclusive subject matter jurisdiction over the Danlys's claim. He characterizes their claim in Lawsuit No. 3 as a claim to the proceeds of the sale of the real property. He says that the proceeds of the real property were the assets of the bankruptcy estate and that the Danlys had two options: (1) file a claim seeking a share of the proceeds, as creditors of The Car Wash; or (2) challenge the premise that the proceeds were indeed assets of the bankruptcy estate. Either way, Scott argues, their claim was a claim against the bankruptcy estate. Because those issues could have been addressed in the bankruptcy proceedings, the bankruptcy court had exclusive jurisdiction to resolve them.

Scott is unduly narrow in his characterization of the Danlys's claims in Lawsuit No. 3. The Danlys asserted four causes of action against Scott: (1) breach of the Partnership agreement; (2) breach of fiduciary duty; (3) accounting; and (4) alter ego—Scott alleged to be the alter ego of Sunny Hills. They alleged, inter alia, that Scott's actions deprived them of the use of Partnership property. They mentioned not only the real property, but also the unpaid rent and the loans due from Sunny Hills, and “the

[P]artnership business.” In short, Lawsuit No. 3 sought damages from Scott due to his actions. It did not constitute an action in rem against the real property. Scott has not explained how the bankruptcy court had jurisdiction to resolve claims against him personally.

That notwithstanding, Scott cites *Choy v. Redland Ins. Co.* (2002) 103 Cal.App.4th 789 as supporting his position. In *Choy*, a personal injury plaintiff filed suit against several defendants, only one of whom failed to settle. (*Id.* at pp. 792-794.) The nonsettling defendant filed chapter 7 bankruptcy proceedings before the underlying litigation was resolved. (*Id.* at p. 794.) The personal injury plaintiff filed a second state court action, this one against the nonsettling defendant’s insurers and attorneys. (*Id.* at pp. 792-793.) The plaintiff stated causes of action for intentional infliction of emotional distress and abuse of process. (*Id.* at p. 795.) He asserted that the insurers had failed to settle his claim for policy limits, instead pushing the nonsettling defendant into bankruptcy, in bad faith. (*Id.* at pp. 793-795.) The plaintiff, “while recognizing the settled principle of law that a bankruptcy court has exclusive jurisdiction over claims for abuse of process which are asserted *by or against a debtor* in bankruptcy, argue[d] that such rule [had] no application in a case, such as [that] one, where the claim [was] not asserted against the debtor, but rather against the debtor’s insurer and attorneys.” (*Id.* at p. 795.) The court rejected that assertion and held that the state court had no subject matter jurisdiction to hear the second state court lawsuit. (*Id.* at pp. 795, 801-802.)

Although *Choy v. Redland Ins. Co.*, *supra*, 103 Cal.App.4th 789 shows that there are times when the bankruptcy court has exclusive jurisdiction even over third parties, the case is not dispositive here. The court in *Choy* held that there were three reasons why the state court did not have subject matter jurisdiction. First, it stated that in order to address the plaintiff’s assertions, the trial court would have to determine whether the bankruptcy proceedings had been initiated “in ‘good faith’ within the meaning of the

Bankruptcy Code.” (*Id.* at p. 801.) Second, it emphasized that “[i]f a bad faith claim against the insurer defendants was one of [the debtor’s] assets, it was for the bankruptcy trustee to pursue it. [The plaintiff] was free to file a claim in bankruptcy and have that claim approved or adjudicated . . . and, if such claim exceeded the relevant policy limits of the insurer defendants, to request that the trustee pursue a claim for an excess judgment against the insurer defendants.” (*Ibid.*, fn. omitted.) Third, it noted that to permit the plaintiff to proceed in state court would be to allow the circumvention of the bar on direct bad faith actions by third party claimants against insurers. (*Ibid.*)

Looking at each of the three reasons the court in *Choy v. Redland Ins. Co.*, *supra*, 103 Cal.App.4th 789 enunciated, it is clear why the case does not control here. First, in order to determine whether Scott had failed to account for Partnership assets or had transferred the real property out of the Partnership without receipt of adequate consideration therefor on behalf of the Partnership, it would not be necessary for the trial court to determine whether The Car Wash’s bankruptcy petition had been filed in good faith. The Car Wash’s bankruptcy filing is several steps removed from Scott’s actions as a partner in the Partnership. Second, while the Danlys did file a claim in The Car Wash bankruptcy, to cover all the bases, their claim in Lawsuit No. 3 was against Scott. Where the plaintiff in *Choy* could have asked the bankruptcy trustee to pursue the insurers, the Danlys could not have asked the bankruptcy trustee to pursue Scott with respect to his actions as a partner in the Partnership. Third, there is no issue in this case parallel to the issue in *Choy* where permitting the state court suit would circumvent the prohibition against direct bad faith actions by third party claimants against insurers.

We take no issue with the general rule expressed in *Choy v. Redland Ins. Co.*, *supra*, 103 Cal.App.4th 789, that “‘no authorized bankruptcy proceeding can properly support a state-law claim for . . . abuse of process. Such state-law tort claims impermissibly intrude upon exclusive federal authority over bankruptcy proceedings and threaten the uniformity of federal bankruptcy law regardless of the nature of the

underlying proceeding.’ [Citation.]” (*Id.* at p. 800.) However, what we have here is not a claim of abuse of process, with respect to The Car Wash’s bankruptcy petition, but rather a claim against Scott individually, with respect to his Partnership obligations. The state court did not lack subject matter to hear that claim.

*(4) Collateral Estoppel and Res Judicata –*

Next, Scott argues that the Danlys’s claim in Lawsuit No. 3 is barred by the doctrines of collateral estoppel and res judicata. With respect to collateral estoppel, Scott maintains that the doctrine bars the Danlys from asserting a right to a share of the proceeds of the sale of the real property from The Car Wash to Vatani, “because they lost that claim.” “Collateral estoppel, or issue preclusion, ‘precludes relitigation of issues argued and decided in prior proceedings.’ [Citation.]” (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896, fn. omitted.) Scott says it was already decided in the bankruptcy proceedings that the Danlys were not entitled to a share of those real property proceeds. That assertion is not supported by the record. The Danlys sought to collect \$715,733, in unpaid rent and unpaid loans, based on the amended judgment in Lawsuit No. 1. The disallowance of their claim constituted an adjudication that they were not entitled to collect \$715,733 in unpaid rent and unpaid loans from The Car Wash. That’s it. The doctrine of collateral estoppel does not operate to preclude litigation of other issues that were not argued and decided in the bankruptcy proceedings, such as whether Scott breached his fiduciary duties as a partner in the Partnership.

With respect to the doctrine of res judicata, Scott asserts that the bankruptcy court, in confirming the plan of reorganization, in essence treated the proceeds of the real property sale as assets of the bankruptcy estate, that there was an “in rem effect,” and that the Danlys were bound by that treatment. He explains that the Danlys could have chosen to challenge, in the bankruptcy proceedings, the assertion that the proceeds of the real property were an asset of the bankruptcy estate. Having failed to do so, he says, they are forever barred from pursuing the proceeds.

“The ‘doctrine of res judicata bars a party from bringing a claim if a court of competent jurisdiction has rendered a final judgment on the merits of the claim in a previous action involving the same parties or their privies.’ [Citation.] Thus, “[r]es judicata bars all grounds for recovery that *could have been asserted*, whether they were or not, in a prior suit between the same parties on the same cause of action.” [Citation.] That applies to matters decided in bankruptcy. [Citation.]” (*Siegel v. Federal Home Loan Mortg. Corp.* (9th Cir. 1998) 143 F.3d 525, 528-529.) “Once a bankruptcy plan is confirmed, it is binding on all parties and all questions that could have been raised pertaining to the plan are entitled to *res judicata* effect. [Citation.]” (*Trulis v. Barton* (9th Cir. 1995) 107 F.3d 685, 691.)

So the Danlys, who, as creditors, were parties to the bankruptcy proceedings, are bound by the confirmed plan and cannot challenge it in Lawsuit No. 3 or any other proceeding. However, they aren’t trying to. Assuming the confirmed plan may be construed as an adjudication that the proceeds of the real property sale to Vatani were assets of the bankruptcy estate, a matter we need not decide, it does not bar the Danlys’s claim in Lawsuit No. 3, which does not challenge the ownership of those proceeds. The judgment in Lawsuit No. 3 affords relief due to Scott’s breach of fiduciary duty for failure to account to the Danlys. Scott’s breach of fiduciary duty was not determined in the bankruptcy proceedings.

It is true that the statement of decision in Lawsuit No. 3 characterized the particular breach of fiduciary duty for which damages were awarded as the failure “to account for and credit the Danlys for their share of the profits and obligations arising from the sale of the [P]artnership real property, and attempting to prevent the Danlys from obtaining their share of the proceeds of the sale of a [P]artnership asset.” This is not the same, however, as a finding that title to the proceeds of the sale to Vatani belonged 45 percent to the Danlys instead of 100 percent to the bankruptcy estate. It is not a finding

as to title at all. Rather, it is a finding concerning a breach of fiduciary duty arising out of the failure to account for the value received for a Partnership asset.

While *Siegel v. Federal Home Loan Mortg. Corp.*, *supra*, 143 F.3d 525 and *Trulis v. Barton*, *supra*, 107 F.3d 685 tell us that all questions that could have been raised concerning the confirmed bankruptcy plan are res judicata, Scott does not explain how it is the Danlys could have raised, in The Car Wash bankruptcy proceedings, issues pertaining to his liabilities, as a partner in the Partnership. The debtor in the bankruptcy proceedings was The Car Wash, not Scott.

Scott does cite several cases wherein a judgment against one party was held to have res judicata effect when the plaintiff attempted to pursue a separate party in another lawsuit. However, as we shall show, those cases are distinguishable.

In *Trulis v. Barton*, *supra*, 107 F.3d 685, a country club filed bankruptcy proceedings. Certain of the country club members then filed a civil action against the country club's founders, directors and attorneys, asserting numerous causes of action arising out of wrongdoing in connection with the inception and operation of the country club. (*Id.* at p. 688.) A plan of reorganization in the bankruptcy proceedings provided that the country club members released the defendants in the civil litigation and were barred from continuing any litigation against them. (*Id.* at pp. 689, 691.) After the plan was confirmed in the bankruptcy proceedings, the district court in the civil litigation granted summary judgment in favor of the defendants. The appellate court affirmed, on the basis of res judicata. (*Id.* at p. 691.)

The appellate court stated: "The release provisions and the bankruptcy court order expressly apply to the same parties and claims as the present suit. The bankruptcy court order confirming the Joint Plan clearly stated that members of each class who elected to become members of the new club, which each plaintiff in this case did, release all claims against the . . . Defendants. Since the bankruptcy order confirming the Joint Plan applied to the same claims and parties involved in this litigation, this suit is

barred by *res judicata* and summary judgment was appropriate.” (*Trulis v. Barton, supra*, 107 F.3d at p. 691; see also *Corbett v. MacDonald Moving Services, Inc.* (2nd Cir. 1997) 124 F.3d 82 [confirmed plan of organization specifically discharged both debtor corporation and its parent corporation]; *Levy v. Cohen* (1977) 19 Cal.3d 165 [confirmed plan specifically discharged both debtor limited partnership and its general partners].)

Contrast the case before us. The Danlys did not, in the bankruptcy proceedings, specifically release their claims against Scott individually, and the order confirming the plan, as far as we know, contained no specific order barring the Danlys from pursuing their claims against Scott.

In *Thibodeau v. Crum* (1992) 4 Cal.App.4th 749, the plaintiffs hired a general contractor to build their home. The construction contract contained a provision requiring that all disputes arising out of the project be resolved by arbitration. The plaintiffs commenced arbitration proceedings against the general contractor with respect to construction defects. (*Id.* at pp. 752-753.) After the arbitrator made his award, the general contractor filed bankruptcy proceedings and the plaintiffs filed suit against the subcontractor who had built the driveway. (*Id.* at pp. 753-754.) The plaintiffs’ action was held barred on the ground of *res judicata*. (*Id.* at p. 752.)

The *Thibodeau* court said “that if the radiating cracks in the driveway were not encompassed within the . . . arbitration, they most certainly should have been. The cracks began appearing immediately after construction of the driveway and well before the arbitration. The [plaintiffs] were aware of the cracks and complained about them long before the arbitration. . . . The driveway was, in fact, within the scope of the arbitration; it [was] mentioned several times in the arbitration award.” (*Thibodeau v. Crum, supra*, 4 Cal.App.4th at p. 756.) The matter of the cracked driveway having been determined in the arbitration award, it was *res judicata* with respect to the parties and their privies. (*Id.* at pp. 754-756; see also *Bernhard v. Bank of America* (1942) 19 Cal.2d

807 [title to funds was adjudicated in probate proceedings, and subsequent litigation against third party with respect to title to funds was barred].)

In the case before us, however, the issue of Scott's liability for breach of fiduciary duty was not litigated in the bankruptcy proceedings. As the *Thibodeau* court observed, "'in California '[i]f the second suit is on a different cause of action, as where there are successive breaches of an obligation, or separate and distinct torts, . . . there is no merger. [Citations.]'" [Citation.]" (*Thibodeau v. Crum, supra*, 4 Cal.App.4th at p. 758.) Here, Scott's breach of fiduciary duty is a separate and distinct tort from the Danlys's claim against The Car Wash. Put another way the Danlys's claim in Lawsuit No. 3 is based on a different cause of action than the Danlys's claim in the bankruptcy. The doctrine of res judicata does not apply.

#### ***B. VALUATION OF REAL PROPERTY:***

##### *(1) Introduction –*

Vatani agreed to the bulk purchase of The Car Wash at the price of \$7,450,000, although Scott cites no portion of the record containing a valuation, if any, that the parties to the sale placed on the real property as a component of the purchase.<sup>1</sup> Escrow closed on February 18, 2004. One issue at trial was the valuation of the real property as of that date. Scott complains that the court erred in accepting the \$5,075,000 valuation offered by the Danlys's expert witness, appraiser John Penner, MAI (Penner).

The statement of decision contains the following findings pertaining to the valuation of the real property: "The Court accepts the value of the Bastanchury real property as of February 18, 2004, as testified to by John Penner in the amount of

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<sup>1</sup> Scott refers us to exhibits 115 and 145 in support of his characterizations of the Vatani purchase. However, while this court requested the exhibits from the parties, exhibits 115 and 145 were not provided. We therefore have incomplete information regarding the terms of the sale, including the component parts of the purchase price.

\$5,075,000.00. The Court finds no fault with Mr. Penner's methodology of using Jeffrey M. Key's appraisal as of March 28, 2003 (Exhibit 114) and the ratio obtained therefrom between the value of the ongoing business concern compared to the value of the partnership real property, then applying that ratio to the value of the real property as of the February 18, 2004 sale date based on comparable sales in a 35-mile radius and an income approach based on rental values. [¶] In addition, no alternative value was offered by Defendant. It is not unreasonable to believe that the real property value of a commercial corner of Harbor Boulevard and Bastanchury Road comprising 1.16 acres (Exhibit 139, pg. 26) would increase during that time period. [¶] The Court finds by a preponderance of the evidence, therefore, that the value of the real property on February 18, 2004 was \$5,075,000.00."

Exhibit 114 was an appraisal of The Car Wash as a going concern, as of March 28, 2003, prepared by Steven Schmidt Herron, MAI, and Jeffrey M. Key, SCREA, for Banco Popular (the Key Appraisal). The appraisal valued the going concern, including both the business and the underlying land, together with improvements and furniture, fixtures, and equipment, at \$6,650,000. Of that total amount, it valued the land, including furniture, fixtures and equipment, at \$4,240,000.

Penner testified that he had reviewed the Key Appraisal, and determined that it employed a cost approach in the valuation of the real property. Penner said that, employing an income approach, he valued the real property at \$4,820,000 as of March 28, 2003. Averaging the \$4,240,000 Key valuation and his \$4,820,000 valuation together, he came up with a valuation of \$4,530,000 as of that date. That figure was 68.1 percent of the total valuation of \$6,650,000 of The Car Wash as a going concern as expressed in the Key Appraisal. Penner then multiplied 68.1 percent, representing the portion of the value of the going concern that was attributable to the real property, by \$7,450,000, the sales price of the going concern on February 18, 2004, and concluded that the value of the real property as of that date was \$5,075,000. Penner also indicated

that an increase in real property value from \$4,820,000 to \$5,075,000, or an increase in going-concern value from \$6,650,000 to \$7,450,000, in the 11-month period in question, was quite reasonable as supported by market trends.

Scott claims there are multitudinous errors in Penner's analysis. Lumped into major categories, however, Scott has three primary complaints: (1) there was no basis for the assumption that if the real property value was 68.1 percent of the total going-concern value on March 28, 2003, it would also be 68.1 percent of the total going-concern value on February 18, 2004; (2) Penner's market trend analysis was not based on substantial evidence; and (3) Penner's \$4,820,000 income approach-based valuation as of March 28, 2003 was not based on either substantial evidence or sound analysis. We address these contentions in turn.

*(2) Ratio Methodology –*

As for his first complaint, regarding the ratio of the value of the real property to the total value of the going concern, Scott charges in his opening brief, albeit without citation to authority, that the application of the 68.1 percent figure to the February 18, 2004 sales price “[was] not a recognized methodology for valuing real property.” In his reply brief, Scott cites a portion of Key's testimony wherein he stated that he had never seen a valuation performed by that methodology. This gave rise to conflicting opinions between two expert witnesses concerning accepted methodologies on valuation. It was up to the trial court to weigh the evidence, and it found that the ratio methodology employed by Penner was appropriate. To hold that this was an erroneous finding, we would have to reweigh the expert opinion testimony. However, this is not the function of the appellate court. (*In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1531.)

Scott also complains that Penner performed no analysis of the business component of the going concern that would show whether the ratio remained the same over the 11-month period. More specifically, he says that Penner did not even consider

the terms of the sale to Vatani, such as the allocations made by the parties and a purported \$500,000 covenant not to compete, that would have borne upon the ratio in question. We are hard pressed to evaluate this point ourselves, inasmuch as Scott has not provided us with the exhibits that would have disclosed the terms of the sale, including the purported \$500,000 covenant not to compete. We have no basis to conclude that the 68.1 percent ratio was erroneously applied over an 11-month period.

*(3) Market Trend Analysis –*

In any event, we note that Penner did not look at the sales price in a vacuum. He opined that, based on a market trend analysis, a business valued at \$6,650,000 on March 28, 2003 could reasonably have increased in value to \$7,450,000, the sales price, by February 18, 2004. Of course, this dovetails into the second of Scott's primary complaints—that Penner's market trend analysis was unsupported.

The analysis Penner utilized involved a comparison of sales of general retail properties within a 35-mile radius of the real property at issue, and showed an overall increase in value of 10.3 percent for the period in question. The analysis was based on a sampling of 1,024 transactions in 2002, 1,317 transactions in 2003 and 1,604 transactions in 2004. It was further based on a determination of price per square foot for those transactions of \$134.64 in 2002, \$146.09 in 2003, and \$163.90 in 2004.

Scott finds many flaws in Penner's analysis. He points out that Penner did not visit all of the properties used in the sampling. He also complains that the sampling bore little relationship to the real property at issue, because it included many types of retail properties other than car washes and included properties in vastly different price ranges. In addition, Scott notes that the increases in price per square foot were not pinpointed to the period of time from the March 28, 2003 date of the Key Appraisal to the December 8, 2003 date of the bulk sales contract.

The first two complaints are directed to the breadth of Penner's sampling. To require the appraiser to have visited every property in a sampling that large obviously

would preclude the use of such a sampling. Of course, Penner could have used a smaller sampling, but there were reasons why he did not do so.

Penner testified that he did indeed perform a separate analysis limited to toll related establishments, such as gas stations, car washes, and other businesses of a similar nature, showing a 19.3 percent increase for the period in question. He chose not to utilize the 19.3 percent increase in property values shown by that analysis because he felt the larger sampling of general retail establishments was more representative of general increases in real estate values. Penner also testified that he performed yet another analysis pertaining exclusively to car washes, showing a 49 percent increase in property value for the period in question. He did not adopt that percentage as the basis for his analysis because he felt the sampling was too small in that category, and not representative of price increases generally.

While Scott argues that Penner's market trend analysis showing a 10.3 percent increase is flawed, and should have been based on a smaller, better tailored sampling, he ignores the fact that Penner performed smaller, better tailored samplings. Had Penner used the market trend analysis derived from those smaller samplings, his valuation of the real property in question would have been far higher.

Finally, we turn to Scott's complaints with respect to the application of the percentage increase to the dates in question. Scott says that the relevant timeframe is the period from the date of the Key Appraisal, March 28, 2003, to the date of the bulk sale contract, December 8, 2003. He then says that the applicable percentage increase for that period of time was 8.1 percent, which he describes as the increase in value per square-foot for eight months of year 2003. Because Penner applied a percentage of 10.3 instead of 8.1, his analysis was flawed, says Scott.

We are unpersuaded. First, the issue was the value of the real property in question as of February 18, 2004, not as of the date of the bulk sales contract. In order to show a property value increase through that date, market data beyond the close of year

2003 was required. Second, while the purchase price as stated in the contract dated December 8, 2003 was one point considered in Penner's overall analysis, it was not the only one. The point of Penner's market trend analysis was to show what the likely increase in value was based on market data, as a measure of value other than the contract price.

*(4) Income Approach to Valuation –*

Scott likewise complains that Penner's \$4,820,000 property valuation as of March 28, 2003, based on an income approach, suffered many flaws. Penner explained that, in determining value based on the income approach, he projected the income stream of lease payments over the remaining term of the lease, deducted projected management expenses, applied a discount to present value, and took into consideration the reversion of the fee interest.

Scott complains that the figure Penner arrived at was materially different than the figure Key arrived at, but that Penner did not disagree with Key's methodology. The fact that the two appraisers came up with different figures, based on different methodologies, does not prove that one of the two was wrong. It is true that Penner said he had no disagreement with Key's use of the cost approach methodology. Yet he also explained why he favored the income approach methodology that he himself used. Penner testified that he preferred the income approach for income-generating property because it "best represents what the market anticipate[s] the owner of that property is going to receive."

Next, Scott says that Penner failed to demonstrate how his \$4,820,000 valuation as of March 28, 2003 related to his \$5,075,000 valuation as of February 18, 2004. This is inaccurate. As previously noted, Penner explained that he took the average of the two March 28, 2003 real property valuations, and compared that figure to the March 28, 2003 going-concern valuation, to arrive at the 68.1 percent ratio. Applying that 68.1 percent ratio to the \$7,450,000 sales price yielded a real property value of

\$5,075,000. As an aside, we observe that if Penner's \$4,820,000 real property valuation were increased by 10.3 percent for the 11-month period in question, a much higher figure than \$5,075,000 would result.

Scott also criticizes Penner for projecting the lease income beginning in March 2003 for the remaining 139 months of the lease term. Scott says that the sale of the property resulted in the termination of the lease, so the projection of lease income beyond February 18, 2004 was improper. This argument overlooks one fundamental point. Penner's \$4,820,000 figure was a valuation of the real property, based on an income approach, as of March 28, 2003. As of March 28, 2003, the real property had not been sold. To conclude that the use of the remaining lease term, viewed as of March 28, 2003, in the calculations was improper would be to hold that an income approach could never be used to fix a value at a point in time before a property had been sold, when a sale had been effectuated by the time the appraisal was prepared. Scott cites no authority to that effect. However, he does cite the portion of Key's testimony wherein Key criticized the use of an assumption that a buyer of property would continue to lease out the property. Once again, what we have is a difference of opinion between two appraisers. It was up to the trial court to weigh the opinion evidence and we do not reweigh it here. (*In re Marriage of Balcof, supra*, 141 Cal.App.4th at p. 1531.)

In addition to the foregoing, Scott contends that in determining the rental value of the real property, for the purposes of establishing the income stream, Penner relied on a document that was insufficient to establish rental value. He cites exhibit 132, of which we have no copy. It is his burden to provide an adequate record to show error. (*Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447.) Having failed to do so, he has precluded our review of his point.

Finally, Scott complains that Penner did not explain why, in discounting the income stream to present value, he applied a discount rate of 12 percent. However, Scott cites no portion of the record showing that he asked Penner for an explanation on that

point. Scott's counsel cross-examined Penner, and specifically asked him how the 12 percent discount was applied in Penner's calculations. He had the opportunity to ask Penner why he chose 12 percent as the discount rate. If he failed to do so, that is not a ground for reversal.

*C. STATEMENT OF DECISION:*

Scott filed a 46-page request for statement of decision, in which he asked the court to answer 49 enumerated controverted issues and provide a factual and legal basis for the decision on each. At the court's direction, the Danlys prepared a statement of decision.

The 17-page statement of decision was divided into six topic headings, together with subtopic headings, as follows: (1) a statement that judgment was granted in favor of the Danlys and against Scott for breach of fiduciary duty, in the amount of \$1,052,292.30, with subheadings addressing the facts on which the court based its decision and the legal basis for the court's decision; (2) a statement that judgment was granted in favor of the Danlys on the cause of action for accounting, with subheadings addressing the facts on which the court based its decision and the legal basis for the decision; (3) a statement that judgment was granted in favor of Scott on the cause of action for breach of contract, with subheadings addressing the facts underlying the court's decision and the legal basis for the decision; (4) a statement that judgment was granted in favor of Scott on the cause of action for alter ego, with subheadings addressing the facts on which the court based its decision and the legal basis for the decision; (5) a statement that Scott had failed to meet his burden of proof with respect to the affirmative defenses and other issues he had placed in controversy, with subheadings addressing (a) subject matter jurisdiction, (b) merger and res judicata, (c) the Danlys's consent to the sale of the real property, (d) collateral estoppel, (e) election of remedies, (f) waiver and estoppel, (g)

statute of limitations, and (h) additional affirmative defenses; and (6) a statement that the court found Danly to be more credible than Scott.

Scott argues that the statement of decision is wholly deficient, for a plethora of reasons. In brief, he claims the statement of decision's failure to address each of his enumerated issues "[made] a mockery of the statement of decision process." We disagree.

"In rendering a statement of decision under Code of Civil Procedure section 632, a trial court is required only to state ultimate rather than evidentiary facts; only when it fails to make findings on a material issue which would fairly disclose the trial court's determination would reversible error result. [Citations.] Even then, if the judgment is otherwise supported, the omission to make such findings is harmless error unless the evidence is sufficient to sustain a finding in the complaining party's favor which would have the effect of countervailing or destroying other findings. [Citation.] A failure to find on an immaterial issue is not error. [Citations.] The trial court need not discuss each question listed in a party's request; all that is required is an explanation of the factual and legal basis of the court's decision regarding the principal controverted issues at trial as are listed in the request. [Citation]" (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230.)

It is true that the court in the case before us did not address every one of Scott's listed questions. However, it was not required to. (*Hellman v. La Cumbre Golf & Country Club*, *supra*, 6 Cal.App.4th at p. 1230.)

#### ***D. ORDERS ON MOTIONS:***

In a footnote to his opening brief, Scott remarks in minimal fashion that, in addition to his other arguments, he is challenging trial court orders, in Lawsuit No. 3, overruling his general demurrer to the Danlys's second amended complaint and denying his motion to dismiss. He has not supported his arguments with citation to authority and

has not placed them under separate topic headings. Consequently, those arguments are waived. (*Roden v. AmerisourceBergen Corp.* (2007) 155 Cal.App.4th 1548, 1575-1576 [argument waived when not supported by legal authority; *Conservatorship of Hume* (2006) 139 Cal.App.4th 393, 395, fn. 2 [argument waived when not contained under separate heading or subheading].)

### III

#### DISPOSITION

The judgment is affirmed. The Danlys shall recover their costs on appeal.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.